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**The British School of Kuala Lumpur Sdn Bhd v Menteri
Sumber Manusia, Malaysia & Ors (No 2)**

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HIGH COURT (SHAH ALAM) — APPLICATION FOR JUDICIAL
REVIEW NO 25–2–01 OF 2014
AZIMAH OMAR JC
7 JULY 2015

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Labour Law — Employment — Dismissal — Employee dismissed for misconduct — No disciplinary procedures of any kind taken against employee before dismissal — Employee not given opportunity to be heard — Whether serious question of law or fact arose whether employee dismissed with just cause — Whether decision of Minister for Human Resources to refer employee's case to Industrial Court for adjudication proper on ground he was denied chance to be heard — Whether in justifying his reference to Industrial Court, Minister wrong to have considered employee's bare denials to misconduct charges as they did not raise serious questions of fact or law that required trial

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The third respondent ('Gilbard') was employed as head-teacher by the applicant. On the ground Gilbard had committed various cases of misconduct, three directors of the applicant held a meeting with Gilbard to inform him his employment contract would not be renewed when it expired the following year. The meeting also discussed the prospect of Gilbard taking up a different job portfolio. Four days after that meeting, when the applicant sent Gilbard an email about the new job portfolio, he responded by expressing shock over the applicant's decision not to renew his contract and pointed out that the applicant had never advised him of the array of misconduct he had allegedly committed. The applicant, nevertheless, went ahead to appoint another person to take over Gilbard's job as head-teacher. Strained relations between Gilbard and the applicant culminated in a second meeting between the parties at which the applicant issued Gilbard a letter terminating his employment pursuant to cl 8.4 of the employment contract which allowed the applicant to immediately terminate the services of an employee on the ground of serious misconduct. Gilbard filed representations at the Industrial Relations Department disputing his dismissal. At conciliatory proceedings held at the department, Gilbard merely denied the applicant's various allegations against him. As the conciliatory meetings did not achieve any settlement, the Director-General of Industrial Relations referred the matter to the Minister for Human Resources ('the Minister') for his consideration. Pursuant to s 20(3) of the Industrial Relations Act 1967 ('the IRA'), the Minister referred Gilbard's representations to the Industrial Court ('IC') for adjudication. In the instant judicial review application, the applicant sought to quash the Minister's reference to the IC

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arguing that in doing so he failed to: (a) properly appreciate the factual matrix of the case; (b) consider facts he ought to have considered and instead had considered matters he ought not to have considered; (c) find there was no serious question of law or fact concerning Gilbard's dismissal that warranted adjudication; and (d) recognise that the case was unfit to be referred to the IC as it went against the purpose and policy of the IRA.

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Held, dismissing the application:

- (1) It was a fact afforded by the applicant itself that when it called for its first meeting with Gilbard it already informed Gilbard of the non-renewal of his contract on the grounds of misconduct. There was no evidence any warnings or enquiries or show-cause notices had been given before the applicant reached a consensus to remove Gilbard from his tenure as head-teacher. The applicant then went on to find a replacement for the applicant even before the expiry of his contract. The termination under cl 8.4 was reached even before any disciplinary proceedings in any form had taken place on any of the cases of misconduct alleged by the applicant (see paras 35–37).
- (2) Although cl 8.4 of the employment contract allowed the applicant to immediately terminate an employee's employment on ground of misconduct, such clauses did not vitiate the employee's right to be heard. One could never contract out of his rights to natural justice. The Minister had noted in numerous places in his affidavit filed in the instant proceedings that in the face of the alleged cases of misconduct, the applicant failed to take any disciplinary action against Gilbard. The Minister had correctly considered that the alleged deprivation of natural justice against Gilbard raised a serious question of fact or law which could identify whether or not he had been dismissed with just cause (see paras 33–34 & 43).
- (3) The Minister had wrongfully considered Gilbard's bare denials to the various allegations made by the applicant to warrant the reference to the Industrial Court. That was a misdirection on the Minister's part in the exercise of his discretion as Gilbard's bare denials could not carry any probative value for him to prove his case. However, even in the face of such misdirection, the court could not ignore the propriety of the Minister's decision regarding Gilbard's right to be heard in a disciplinary proceeding before the applicant decided to dismiss him. The Minister's misdirection in considering Gilbard's bare denials did not vitiate his exercise of discretion in toto and he was correct in deciding to refer the matter to the Industrial Court as there was a serious issue to be tried with regard to Gilbard's fundamental right to be heard (see paras 48, 50, 52, 54 & 56).

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- A (4) In considering Gilbard's right to be heard in a disciplinary proceeding, the Minister had not misdirected himself nor had he contradicted the object, purpose and policy of the Industrial Relations Act 1967 as it was only fitting that the dispute was referred to the Industrial Court for determination after the conciliatory meetings at the Industrial Relations Department failed to achieve any settlement (see paras 61–62).
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[Bahasa Malaysia summary]

- Responden ketiga ('Gilbard') telah diambil bekerja sebagai guru besar oleh pemohon. Atas alasan Gilbard telah melakukan pelbagai kes salah laku, tiga
- C pengarah pemohon mengadakan mesyuarat dengan Gilbard untuk memberitahu kontrak pekerjaannya tidak akan diperbaharui apabila kontrak tersebut tamat pada tahun berikutnya. Mesyuarat itu juga membincangkan kemungkinan Gilbard akan melakukan portfolio kerja yang berbeza. Empat hari selepas mesyuarat tersebut, apabila pemohon menghantar Gilbard satu
- D e-mel mengenai portfolio pekerjaan baru, dia membalas dengan menyatakan rasa terkejut dengan keputusan pemohon yang tidak memperbaharui kontraknya dan menyatakan bahawa pemohon tidak pernah menasihatinya tentang pelbagai salah laku yang didakwa dilakukannya. Pemohon, bagaimanapun, meneruskan dengan melantik seorang lain untuk mengambil
- E alih tugas Gilbard sebagai guru besar. Hubungan tegang antara Gilbard dan pemohon berakhir dalam mesyuarat kedua antara pihak-pihak di mana pemohon mengeluarkan Gilbard surat penamatan pekerjaannya menurut klausa 8.4 kontrak pekerjaan yang membenarkan pemohon dengan segera menamatkan perkhidmatan seseorang pekerja atas alasan salah laku yang
- F serius. Gilbard memfailkan perwakilan di Jabatan Perhubungan Perusahaan mempertikaikan pemecatannya. Pada prosiding pendamaian yang diadakan di jabatan, Gilbard hanya menafikan pelbagai dakwaan pemohon terhadapnya. Memandangkan mesyuarat pendamaian tidak mencapai apa-apa penyelesaian, Ketua Pengarah Perhubungan Perusahaan merujuk perkara tersebut kepada
- G Menteri Sumber Manusia ('Menteri') untuk pertimbangan beliau. Menurut s 20(3) Akta Perhubungan Perusahaan 1967 ('APP'), Menteri merujuk perwakilan Gilbard ke Mahkamah Perusahaan ('MP') untuk pengadilannya. Dalam permohonan semakan kehakiman segera, pemohon memohon untuk membatalkan rujukan Menteri kepada MP dengan alasan bahawa dengan
- H berbuat demikian beliau gagal: (a) secara wajar menghargai matriks fakta kes tersebut; (b) mempertimbangkan fakta-fakta yang sepatutnya dipertimbangkan dan sebaliknya mempertimbangkan perkara-perkara yang tidak sepatutnya beliau pertimbangkan; (c) mendapati bahawa tiada persoalan undang-undang serius atau fakta berhubung pemecatan Gilbard yang wajar diadjudikasi; dan (d) mengiktiraf bahawa kes tersebut tidak layak untuk
- I dirujuk kepada MP kerana kes tersebut bertentangan dengan tujuan dan dasar APP.

Diputuskan, menolak permohonan:

- (1) Satu fakta yang diberikan oleh pemohon itu sendiri ialah apabila dia dipanggil untuk mesyuarat pertamanya dengan Gilbard, dia sudah memaklumkan Gilbard tentang ketidakbaharuan kontraknya atas alasan salah laku. Tiada apa-apa keterangan amaran atau pertanyaan atau notis salah laku yang diberikan sebelum pemohon mencapai kata sepakat untuk membuang Gilbard dari tempoh perkhidmatannya sebagai guru besar. Pemohon kemudiannya mencari pengganti pemohon sebelum tamat kontraknya. Penamatan di bawah klausa 8.4 telah dicapai sebelum apa-apa prosiding tatatertib berlaku ke atas mana-mana kes salah laku yang didakwa oleh pemohon (lihat perenggan 35–37). A
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- (2) Walaupun klausa 8.4 kontrak pekerjaan membenarkan pemohon untuk segera menamatkan pekerjaan pekerja atas alasan salah laku, klausa tersebut tidak melemahkan hak pekerja untuk didengar. Seseorang tidak boleh mengontrak keluar haknya untuk keadilan asasi. Menteri telah menyatakan di beberapa bahagian dalam affidavit beliau yang difailkan dalam prosiding ketika itu bahawa dalam menghadapi kes dakwaan salah laku, pemohon gagal untuk mengambil apa-apa tindakan tatatertib terhadap Gilbard. Menteri dengan tepat mempertimbangkan halangan kepada keadilan asasi terhadap Gilbard telah menimbulkan persoalan serius fakta atau undang-undang yang boleh mengenal pasti sama ada ia atau tidak dia telah dipecat tanpa sebab yang wajar (lihat perenggan 33–34 & 43). D
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- (3) Menteri telah secara salah mempertimbangkan penafian kosong Gilbard terhadap pelbagai dakwaan yang dibuat oleh pemohon untuk mewajarkan rujukan kepada Mahkamah Perusahaan. Itu merupakan salah arah di pihak Menteri dalam melaksanakan budi bicara beliau memandangkan penafian kosong Gilbard tidak membawa apa-apa nilai untuk dia membuktikan kesnya. Walau bagaimanapun, meski menghadapi salah arahan, mahkamah tidak dapat mengabaikan kewajaran keputusan Menteri mengenai hak Gilbard untuk didengar dalam prosiding tatatertib sebelum pemohon memutuskan untuk memecatnya. Salah arah Menteri dalam mempertimbangkan penafian kosong Gilbard tidak melemahkan pelaksanaan budi bicara beliau secara sepenuhnya dan beliau bertindak tepat dalam membuat keputusan untuk merujuk perkara tersebut ke Mahkamah Perusahaan memandangkan terdapat isu serius untuk dibicarakan berhubung hak asasi Gilbard untuk didengar (lihat perenggan 48, 50, 52, 54 & 56). F
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- (4) Dalam mempertimbangkan hak Gilbard untuk didengar dalam prosiding tatatertib, Menteri tidak tersalah arah dan tidak pula beliau bercanggah dengan objek, tujuan dan polisi Akta Perhubungan Perusahaan 1967 kerana adalah bersesuaian bahawa pertikaian tersebut dirujuk ke Mahkamah Perusahaan untuk penentuan selepas mesyuarat pendamaian di Jabatan Perhubungan Perusahaan gagal untuk mencapai I

A apa-apa penyelesaian (lihat perenggan 61–62).]

Notes

For cases on dismissal, see 8(1) *Mallal's Digest* (5th Ed, 2015) paras 1144–1222.

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Cases referred to

Abdullah Azizi bin Abd Hamid v YB Menteri Sumber Manusia Magnum Corp Bhd [1997] MLJU 291; [1998] 2 CLJ 297, HC (folld)

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Ambank (M) Bhd v Menteri Sumber Manusia & Anor and another appeal [2014] 6 MLJ 377, CA (folld)

Chan Soon Lee v YB Menteri Sumber Manusia, Malaysia & Anor [1997] MLJU 196; [1998] 5 CLJ 133, HC (folld)

Exxon Chemical (M) Sdn Bhd v Menteri Sumber Manusia, Malaysia & Ors [2007] 3 MLJ 1; [2007] 2 CLJ 97, FC (refd)

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Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal [1996] 1 MLJ 481, CA (refd)

Loh Siew Kim v Menteri Sumber Manusia, Malaysia and Anor [2010] MLJU 558; [2010] 1 LNS 558, HC (folld)

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Mahon v Air New Zealand Ltd and others [1984] 3 All ER 201, PC (folld)
Malayan Banking Bhd v Association of Bank Officers, Peninsular Malaysia & Anor [1988] 3 MLJ 204; [1988] 1 CLJ Rep 183, SC (folld)

Malaysia Airline System Bhd v Wan Sa' adi @ Syed Sa' adi bin Wan Mustafa [2015] 1 MLJ 757, FC (folld)

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National Union of Hotel, Bar and Restaurant Workers v Minister of Labour and Manpower [1980] 2 MLJ 189, FC (folld)

Legislation referred to

Federal Constitution

Industrial Relations Act 1967 s 20, 20(1)

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Rules of Court 2012 O 53 r 3

Amardeep Singh (Lee Hishamuddin Allen & Gledhill) for the applicant.

Hani Haniza (Selangor Legal State Offices) for the first respondent.

Anand Ponnudurai (Kamini with him) (Bodipalar Ponnudurai De Silva) for the third respondent.

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Azimah Omar JC:

BACKGROUND FACTS

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[1] This is an application by the applicant ('The British School of Kuala Lumpur Sdn Bhd') for judicial review pursuant to O 53 r 3 of the Rules of Court 2012 ('the ROC 2012'). The applicant has sought from this court, inter alia, for an order of certiorari and an order for prohibition against the first

respondent, the Minister of Human Resources ('Minister') in referring ('reference') the representation ('representation') made by the third respondent (Gilbard Honey-Jones) who is the ex-employee ('employee') of the applicant to the Industrial Court which is the second respondent for an award or decision.

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[2] Succinctly put, it is the applicant's case that the Minister had misdirected his discretion under s 20 of the Industrial Relations Act 1967 ('the Act') in making such reference regarding a representation which in essence allegedly is not a case fit to be referred to the Industrial Court.

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[3] The applicant is a private co-educational international school which facilitates education based on the curriculum of England and Wales.

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[4] The employee commenced his employment as a headteacher with the applicant on 1 February 2009 (see exh DB1 of the applicant's affidavit in support ('AIS')).

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[5] Thereafter, concerns and issues arose regarding the employee's alleged conduct in his performance of his duties as headteacher of the applicant and the non-tenability of continuing with his appointment. Evidence of which has been categorically appended in exh DB-A1 of the applicant's affidavit in reply against the Minister's affidavit in reply (there are contentions made against these evidences by the employee. This court shall delve into these contentions later in this judgment).

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[6] Entailing his poor performance and misconducts, a meeting was held on 9 November 2012 between the employee and three directors of the applicant namely, Stewart Fry, Darren Brown and John Ordovas ('first meeting'). In the same meeting, the employee was informed of the fact that the school see it fit not to renew his contract upon expiration the following year in April 2014. The employee was informed and has discussed a prospect of the employee taking up the position of group advisory board chairman instead of his previous tenure as the applicant's headteacher ('prospect').

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[7] Following the first meeting, Stewart Fry sent an email of 13 November 2012 to the employee in reference to their discussion during the first meeting regarding the employee's prospect (see exh DB2 of the AIS).

[8] In response to the email above, the employee sent an email of 29 November 2012 mainly expressing of his shock at the board's decision to not renew his contract and also to the alleged fact that the applicant has never advised himself of the array of alleged misconducts (see exh DB3 of the AIS):

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It was a pity that I *was not advised of your discontent and the bombshell of non-contract*

A *renewal came as quite a shock.* (Emphasis added.)

[9] In the same email, the employee requested for time to consider the prospect at least after the Christmas holidays.

B [10] In the midst of the employee's consideration, the applicant took steps to find and appoint a new headteacher, one Janet Brock in the employee's stead. Janet Brock was appointed vide a fixed term employment agreement dated 29 January 2013 which stated that she shall assume her duties as headteacher on 1 March 2013 (see exh DB7 of the AIS).

C [11] All throughout Janet's candidacy to her appointment, the applicant and the employee were at loggerheads and were stagnated at an impasse. In efforts to break the impasse, a discussion was held between the applicant and the employee on 26 February 2013. It entails that the parties were not able to reach to a mutual cessation of the employee's tenure. Thus, the applicant hinging on cl 8.4 of the employment contract decided to terminate the employee's employment on the reason of the employee's alleged misconducts. Here, the applicant sought to exercise its alleged managerial prerogative as an employer. D In the same meeting, the applicant issued a termination letter dated 26 February 2013 which contains terms of mutual separation vide the employee's cessation from employment with the applicant (see exh DB8 of the AIS for the termination letter).

E [12] Clause 8.4 of the employment contract reads:

The School may terminate the Contract immediately and with no further remuneration in the event of serious misconduct on behalf of the Employee. Cases of serious misconduct include but are not limited to:

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- Conduct set out in the School's disciplinary procedures which warrants dismissal without notice
 - Any serious act of negligence or neglect of duty

H [13] In response to the termination letter, the employee vide his solicitors has rejected the terms of mutual separation in the termination letter and states that he will resume his duties on 10 March 2013 (see exh DB9 of the AIS for this letter dated 1 March 2013).

I [14] Consequent to the employee's termination, the employee proceeded to file a representation at the Department of Human Resources. The applicant then was informed through a letter dated 15 May 2013 that it is required to attend a conciliatory meeting ('conciliatory meeting') at the Department of

Human Resources on 29 May 2013. However, the conciliatory meeting had only taken place on 4 July 2013 (see exh DB45 of the AIS for the 15 May 2013 letter).

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[15] The applicant had furnished the full extent of the facts and circumstances of the employee's misconducts during the conciliatory meeting. The employee has only denied the allegations forwarded by the applicant. The conciliatory meeting was dismissed without any success of reaching a mutual settlement or separation between the parties.

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[16] Following the conciliatory meeting, the applicant has issued the employer's information form ('information form') to the Department of Human Resources on 19 July 2013. The same information form succinctly sets out all the facts and misconducts leading to the employee's termination (see exh DB46 of the AIS).

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[17] Furthermore, the applicant has issued its own written representation ('written representation') on 31 July 2013 enclosing all of the relevant and contemporaneous documents to prove the employee's misconducts leading to his termination (see exh DB-A1 of the applicant's affidavit in reply for the written representation and all of the appended documents).

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[18] The same written representation has extensively set out the facts and circumstances of the employee's misconducts leading up to the employee's termination. The mass of the employee's misconducts include, inter alia:

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- (a) appointing a deputy headteacher without the joint approval of board members;
- (b) neglecting to carry out a police and reference checks (in appointment process) and to take remedial steps;
- (c) neglecting to organise and to oversee staff appraisals annually;
- (d) dismissing staff without the board's approval and/or legal advice;
- (e) discriminatory exercise of disciplinary authority;
- (f) failing to take care of health and welfare of students and staff; and
- (g) failure in communication and dealings with parents of the students regarding the Telekom Towers, change in school lunch menu and scholarship application.

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- A [19] The Director General of Industrial Relations ('DGIR') has forwarded his notification and report dated 30 August 2013 to the Industrial Relations Headquarters in Putrajaya for the Minister's consideration (see exh DB48 of the AIS).
- B [20] The Minister accordingly has averred in his affidavit in reply in paras 25 and 27 that he has duly received and considered the information form and written representation.
- C [21] Ensuing from the above, the Minister has issued a letter dated 28 October 2013 which was received by the applicant on 1 November 2013 informing of his decision to refer the employee's representation to the Industrial Court ('reference') (see exh DB49 of the AIS).
- D [22] The applicant's case is against this reference. The applicant's case can be summarised in the following manner.
- [23] The Minister had misdirected himself in inappropriately exercising his discretion under s 20 of the Act on the grounds that:
- E (a) the Minister had failed to properly appreciate the factual matrix of the case. In that the Minister had failed to consider facts which he ought to consider and had considered matters which he ought not to consider;
- F (b) the Minister had failed to appropriately find that there was no serious question of law or fact of whether the employee was terminated with just cause; and
- (c) the Minister had failed to identify that the case to be a case unfit to be referred to the Industrial Court as it goes against the purpose and the policy of the Act itself.
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- HAVE THE MINISTER PROPERLY APPRECIATE THE FULL FACTUAL MATRIX OF THE CASE?
- H [24] Now, it is plain to this court that the second and third grounds of contention of the applicant can only be answered if the first ground of contention has been determined. Thus, this court shall first delve into the underlying facts of this case and identify if there were indeed any misdirection on the part of the Minister in exercising his discretion under s 20(1) of the Act
- I in referring the representation to the Industrial Court for adjudication.
- [25] There is little dispute on the underlying law and principle governing the Minister's duty to examine and appreciate the full facts of the representations

and report he received from the Director General of Industrial Relations regarding the dispute and the conduct of the conciliation meetings.

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[26] Generally in exercising the court's discretion in judicial reviews this court is guided by the decision of the Court of Appeal in *Ambank (M) Bhd v Menteri Sumber Manusia & Anor and another appeal* [2014] 6 MLJ 377:

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It has been accepted by the courts too that ... the court could still go behind the decision, where the allegations raised were to the effect that the decision maker had transgressed principles of procedural impropriety, illegality or irrationality (may be even proportionality) in arriving at the impugned decision.

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In those circumstances, it was open to the court to extend its scrutiny into the area of the merits or justification behind that decision.

[27] The applicant's allegation is exactly to that effect. Thus, it is fitting that the court delves into the merits or justification of the Minister's decision in the present case.

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[28] This court is guided by the High Court decision in *Chan Soon Lee v YB Menteri Sumber Manusia, Malaysia & Anor* [1997] MLJU 196; [1998] 5 CLJ 133 at p 160:

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Just as a workman is entitled to the said protection, similarly the law recognises the right of an employer to dismiss his workman with just cause or excuse. The minister when acting under s 20(3) of the Act has to see that these two distinct rights are safeguarded *based on the facts and material placed before him* in the notification made to him by the director-general under s 20(2) of the Act ... the role of the minister is to ascertain *whether on the facts and material placed before him*, the representation raises serious questions of fact or of law calling for adjudication by the Industrial Court. (Emphasis added.)

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[29] On the same principle, the employee in its submissions has referred to the Federal Court decision in *Exxon Chemical (M) Sdn Bhd v Menteri Sumber Manusia, Malaysia & Ors* [2007] 3 MLJ 1; [2007] 2 CLJ 97:

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It meant that there should be an *objective examination of the factual matrix available before the Minister* in order to ascertain whether a reasonable person, in similar circumstances, would have arrived at the decision which the Minister had done. (Emphasis added.)

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[30] It is also a proof of a misdirection of a Minister's discretion if it can be proven that he has either considered irrelevant facts or failed to consider relevant facts. This court is guided by the case referred by the employee herself in *Malayan Banking Bhd v Association of Bank Officers, Peninsular Malaysia & Anor* [1988] 3 MLJ 204; [1988] 1 CLJ Rep 183:

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... the court can interfere with the Minister's decision if he ... has *taken into*

A *consideration matters which he ought not have taken into account or vice versa; or has otherwise gone wrong in law. (Emphasis added.)*

B [31] It is also the law that the Minister should be apprised of all of the facts of the dispute from the DGIR and can only refer to the facts raised to the DGIR in his report to the Minister. The role of the DGIR's report is verily important in the proper exercise of the Minister's discretion under s 20 of the Act. This court is guided by the case of *Abdullah Azizi bin Abd Hamid v YB Menteri Sumber Manusia Magnum Corp Bhd* [1997] MLJU 291; [1998] 2 CLJ 297 at pp 301–302:

C He relies purely on the notification made to him by the Director General under sub-s (2) ... With the notification he would have before him naturally the report of the proceedings including whatever evidence both oral and documentary presented therein. Upon all these matters placed before him, the Minister would make a study and decide as to whether the representation is frivolous or vexatious. *He is not allowed to consider other irrelevant matters not placed before him by the Director General. That being the case, what took place before the Director General during conciliation proceedings is crucial. (Emphasis added.)*

D *The Minister has correctly considered the absence of disciplinary actions on all of the alleged misconducts of the employee*

E [32] It goes without saying that the no person in shall be deprived of his rights to natural justice in his rights to be heard. This is a verily substantial and fundamental rights afforded under the nation's own Federal Constitution.

F [33] Although the court takes notice of cl 8.4 of the employment contract which allows the applicant to immediately terminate the employee's employment, such clauses does not vitiate the employee's rights to be heard. One can never contract out of his rights to natural justice.

G [34] The Minister in his affidavit has averred in numerous paragraphs (replying against the applicant's allegation on the employee's misconduct) that even in the face of these misconducts, the applicant 'telah gagal mengambil tindakan disiplin' or has failed to take disciplinary actions against the employee.

H [35] It is the fact afforded by the applicant itself that the board in calling for the first meeting has already informed the employee of the non-renewal of his contract on the grounds of the employee's misconducts. There were no evidences that any warnings or enquiries or show-causes has been allowed to the applicant before the board reached a consensus to remove the employee from his tenure as headteacher.

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[36] Albeit that the employee was granted a garden leave for a few months to consider the prospect, it cannot be argued that the employee has not attempted to justify or contended against the allegations during this time. This is because firstly, in that time, the applicant has already actively sought to find a replacement which in fact did replace the applicant before the expiration of his contract. Secondly, the decision to remove the employee from his tenure vide the prospect and non-renewal of his contract was reached even before the employee went on his garden leave.

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[37] The finality of the termination under cl 8.4 during the meeting on 26 February 2013 was reached even before any disciplinary proceedings in any form took place on all of the misconducts alleged by the applicant.

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[38] It is imperative for this court to highlight that the applicant itself has vide its AIS exhibited a 'Formal Warning' against one Zirra Azim, a nursery teacher of the applicant who is given a warning the she may be instantly dismissed should she continue to commit 'any serious act of negligence of duty' under cl 8.2(2) of Zirra Azim's employment contract (see exh DB34 of the AIS).

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[39] Thereafter, the applicant in dismissing Zirra Azim further issued a termination letter following the previous warning which reads:

Please accept this letter as notification of immediate termination ... This follows a *formal warning* given to you on 26th April, 2012 when it was explained that further absences and poor communication of such, will result in your dismissal ...

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This dismissal is covered under section 8.2 of your contract which states 'The School may terminate the contract immediately and with no further remuneration in the event of serious misconduct on behalf of the employee. Cases of serious misconduct include but not limited to:

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– Any serious act of negligence or neglect of duty.

[40] It is verily clear that firstly, the clause in which the warning and dismissal refers to is verily similar to cl 8.4 of the employee's contract in the present case. Secondly, for such negligence or neglect of duty, clearly there is an operating/disciplinary procedure that the applicant adheres to in the face of employee misconducts.

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[41] Peculiarly and importantly, evidences of these procedures were not exhibited with regard to the employee's series of misconducts. It is irrelevant that the employee holds a high position in the school. It does not negate the fact that he should be subjected to the same disciplinary procedures as other employees of the applicant.

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- A [42] The rule of natural justice is an encompassing principle that ought to be adhered to by all administrative authorities. This court is guided by the recent Federal Court decision in *Malaysia Airline System Bhd v Wan Sa' adi @ Syed Sa' adi bin Wan Mustafa* [2015] 1 MLJ 757:
- B [25] The basic rules of natural justice are generally understood to mean the right to be heard, the rule against bias and the duty to act fairly. However the scope of the 'duty to act fairly' should be considered on a case to case basis depending on the facts and circumstances governing the relationship of those involved prior to the decision being made.
- C [26] As regards procedural fairness it encompasses the procedures used by a decision maker and not so much the actual decision itself. Ordinarily, *procedural fairness requires a hearing that is appropriate to the facts and circumstances of the matter, the absence of bias, the availability of evidence and an inquiry into the issue before a decision is made.*
- D [27] In *Ketua Pengarah Kastam v Ho Kwan Seng* [1977] 2 MLJ 152 at p 154 Raja Azlan Shah FCJ (as His Majesty then was) said this:
- E *In my opinion, the rule of natural justice that no man may be condemned unheard should apply to every case where an individual is adversely affected by an administrative action, no matter whether it is labelled 'judicial', 'quasi-judicial', or 'administrative' or whether or not the enabling statute makes provision for a hearing.*
- F But the hearing may take many forms and strict insistence upon an inexorable right to the traditional courtroom procedure can lead to a virtual administrative breakdown. That is because a formal hearing is too slow, too technical and too costly. Lord Shaw's caveat on administrative adjudication that 'judicial methods may ... be entirely unsuitable, and produce delays, expenses, and public and private injury' is too well-known to be side-stepped: see *Local Government Board v Arlidge* [1915] AC 120 at p 138. In the last analysis, it depends on the subject matter. The great need is to deal efficiently and fairly, rather than to preserve all the accouterments of the court room; *the considerations of basic fairness are paramount.* (Emphasis added.)
- G [43] Thus, the Minister has in this regard, correctly considered the alleged deprivation of natural justice against the employee raises a serious question of fact or law which would identify whether or not the employee was dismissed with just cause.
- H *The Minister has wrongfully considered the employee's bare denials during the conciliatory meeting*
- I [44] Now, amidst the numerous contention of the applicant that the Minister has categorically not considered facts of the dispute, this court is also minded that the Minister has also averred that the facts were only not brought up during the conciliatory meeting but has already been considered by the Minister vide the representation and documents forwarded to the Minister's office.

[45] Even the applicant's submission's focal point is on the contention that the Minister is wrong in considering the employee's bare denial rather than the Minister's failure to consider facts of the dispute. A

[46] The Minister indeed has considered the employee's bare denials without any reference of to any evidences or documents to disprove the applicant's allegation of misconducts. The Minister did not even exhibit any of the supposed evidences which the employee purportedly referred to in disproving his misconducts. The Minister simply avers in para 26 of his affidavit in reply: B

Perenggan 63 dalam Afidavit Pemohon adalah dirujuk dan saya menyatakan bahawa Responden Ketiga telah menafikan perkara tersebut ketika rundingan damai. C

[47] The Minister also has averred in para 28.5 of his affidavit in reply that he has considered that the employee has denied the allegations of misconducts in which the employee had done so with reference to 'dokumen-dokumen yang relevan' or relevant documents. However, at the same time, the Minister never exhibited or even specifically referred to these so-called relevant documents purportedly referred to by the employee. D

[48] Clearly, without any references to these relevant documents, it is apparent that the Minister had considered the bare denial in concluding that there was a serious question of fact or law warranting the reference to the Industrial Court. This consideration is indeed a misdirection in the Minister's exercise of his discretion. This court is guided by the case of *Loh Siew Kim v Menteri Sumber Manusia, Malaysia and Anor* [2010] MLJU 558; [2010] 1 LNS 558 at p 24: E

I agree with counsel for the second respondent that a determination that there are serious issues to be tried *cannot be arrived at only upon bare allegations*. To raise a serious issue, not just a mere issue, fit to be tried by the Industrial Court, *the opposite party must condescend upon particulars*. (Emphasis added.) F G

[49] This court also finds valuable guidance in the Privy Council decision in *Mahon v Air New Zealand Ltd and others* [1984] 3 All ER 201. Lord Diplock in delivering the Privy Council's decision has held: H

The *rules of natural justice that are germane* to this appeal can, in Their Lordships' view, be reduced to those two that were referred to by the English Court of Appeal in *R v Deputy Industrial Injuries Comr, ex p Moore* [1965] 1 All ER 81 at pp 94–95; [1965] 1 QB 456 at pp 488–490, which was dealing with the exercise of an investigative jurisdiction, though one of a different kind from that which was being undertaken by the judge inquiring into the Mt Erebus disaster. The first rule is *that the person making a finding in the exercise of such a jurisdiction must base his decision on evidence that has some probative value* in the sense described below. The second rule is that he must listen fairly to any relevant evidence conflicting with the finding I

A and any rational argument against the finding that a person represented at the inquiry, whose interests (including in that term career or reputation) may be adversely affected by it, may wish to place before him or would have so wished if he had been aware of the risk of the finding being made. (Emphasis added.)

B [50] The Minister in his affidavit has indicated that he has considered the employee's bare denial. Such bare denial cannot carry any probative value for the employee to prove his case. Thus, here the Minister has wrongfully considered the employee's bare denial as a ground to warrant his reference to the Industrial Court.

C IS THE MINISTER'S FINDING THAT THERE WAS SERIOUS ISSUE TO BE TRIED OR THERE WAS A QUESTION OF LAW OR FACT OF WHETHER THE EMPLOYEE WAS TERMINATED WITH JUST CAUSE, A PROPERLY CONCEIVED FINDING?

D [51] Alluding to the above, the Minister has found that there was an issue to be tried on whether the employee was dismissed with just cause which warrants his reference to the Industrial Court. His finding mainly hinges on these two grounds:

E (a) there is a valid dispute regarding the evidences of the employee's misconduct which should be decided by the Industrial Court (to which the court earlier found is a wrongful consideration); and

F (b) there is a serious issue to be tried of whether the employee was dismissed with just cause in light of the fact that the employee was not afforded his rights to be heard in a disciplinary action.

G [52] Indeed, the court acknowledges that the Minister's consideration to the employee's bare denials is a misdirection of his exercise of discretion. However, even in the face of such misdirection, equally so, the court cannot ignore the propriety of the Minister's decision regarding the employee's rights to be heard in a disciplinary proceeding before the applicant decides to dismiss the employee.

H [53] As had been decided by the Federal Court in the *Malaysia Airline's* case in referring to Raja Azlan Shah FCJ's (as His Majesty then was) decision, the rights to be heard is a pinnacle consideration in any administrative decision.

I Such rights must be afforded to every man subjected to such decision.

[54] Thus, this court is of the view that the Minister's misdirection in considering the employee's bare denials does not vitiate the Minister's justification in the exercise of his discretion in toto. There is indeed an

undeniable serious issue to be tried in the Industrial Court with regard to the employee's fundamental rights to be heard. A

[55] Furthermore, it is verily unbecoming of the court to forego one employee's rights to natural justice merely because of the Minister's improper exercise of his discretion under the Act. The employee has the rights to have the Industrial Court to decide on his rights to be heard and this court is not about to impede on that right. B

[56] Thus, it is this court's finding that notwithstanding the Minister's misdirection in considering the employee's bare denials, the Minister remains correct in deciding to refer the employee's representation to the Industrial Court in light of the employee's fundamental right to natural justice (his right to be heard). C

HAS THE MINISTER MISDIRECTED HIS DISCRETION IN CONTRADICTING THE PURPOSE, OBJECT AND THE POLICY OF THE ACT ITSELF? D

[57] The preamble of the Act stipulates the overriding policy, object and purpose of the Act to be: E

An act to promote and maintain industrial harmony and to provide for the regulation of the relations between employers and workmen and their trade unions and the *prevention and settlement* of any differences or disputes arising from their relationship and generally to deal with trade disputes and matters arising therefrom. (Emphasis added.) F

[58] Precedents have even decided that the Minister must exercise his discretion in promoting such settlement of dispute. This court is guided by the Federal Court decision in *National Union of Hotel, Bar and Restaurant Workers v Minister of Labour and Manpower* [1980] 2 MLJ 189 at p 191: G

Thus we must construe the Industrial Relations Act 1967, to determine its policy and object. *It cannot be gainsaid that the intention of the Act is to regulate the relations between management and labour and to prevent and settle trade disputes arising there from.* (Emphasis added.) H

[59] Furthermore, the Court of Appeal has also held in *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal* [1996] 1 MLJ 481 at p 61: I

Put simply, the first question which the Minister ought to ask himself is *whether the way in which he proposes to exercise his discretion will have the effect of preventing or settling the particular dispute; for that is what the Act is primarily aimed at ...* (Emphasis added.)

A [60] In fact, the Court of Appeal has recently decided in *Ambank (M) Bhd v Menteri Sumber Manusia & Anor and another appeal* [2014] 6 MLJ 377 that:

B [31] More to the point at hand, we have judicial pronouncements which *make it clear that the Minister's exercise of discretion or administrative powers under the provisions of the IR Act must always be within the objectives of the legislation* and the scope of his statutory responsibilities. (Emphasis added.)

C [61] Upon the authorities above, this court finds that the Minister in considering the employee's right to be heard in a disciplinary proceeding has not misdirected himself and contradicted the object, purpose and policy of the Act.

D [62] It was undisputed that a mutual separation or settlement was never concluded between the applicant and the employee. Thus, it is only fitting that the dispute is referred to the Industrial Court to be determined after the conciliatory meetings have already failed with the DGIR.

E [63] It is instead against the policy of the Act if the Minister has not make the reference as the dispute would be left hanging without any closure, which in turn, would promote industrial disharmony between the applicant as the employer, the employee and even the Industrial Relations Department as the administrative authority.

F THE COURT'S FINDINGS

G [64] In light of all the deliberations above, it is this court's finding that the Minister remains correct in deciding to refer the employee's representation to the Industrial Court in light of the employee's fundamental right to natural justice (his right to be heard).

H [65] The employee's right to be heard is a fundamental right which cannot be dispensed with. Thus, it is indeed a serious issue to be tried and is a valid question of law or fact to be referred to the Industrial Court to be determined.

H THE COURT'S DECISION AND DIRECTIONS

I [66] In light of all of the above findings and having considered the applicant's application in its totality, it is this court's decision that the applicant has not made out a case for a judicial review. Thus, this court hereby dismisses the applicant's application for an order of certiorari to quash the Minister's reference dated 28 October 2013.

ON THE ISSUE OF COSTS

[67] The parties have agreed to an agreed costs of RM5,000. Thus, this court hereby orders that the applicant do pay the respondents a sum of RM5,000 in costs.

Application dismissed.

Reported by Ashok Kumar

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